IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 353 OF 1994

THE STATE OF MAHARASHTRA) .. APPELLANT

Versus

1. BHAGWAN NAGARE)
   R/at Krantinagar Jhopadpatti)
   Karjat.)

2. KALLU ISMAIL)
   R/at Krantinagar Jhopadpatti)
   Karjat.)

Mrs. M.M. Deshmukh, APP for State

CORAM:-SMT. RANJANA DESAI, J.

DATED:-5/10/2006

ORAL JUDGMENT:

. The State of Maharashtra has challenged in this appeal the judgment and order dated 31/01/94 rendered by Judicial Magistrate, First Class (Railway) Court, Pune, acquitting the respondent accused of the offence punishable under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966 ("the said Act" for short). It is necessary to give the gist of the facts of the case.

2. On 25/2/91 ASI G.R. Pandey, ASI V. L. Lamani and constable B.No.2368 Shaikh Musa were on duty at Reserve Protection Force-Post-Karjat. They received a secret information about the transportation of stolen property. Hence they went to Karjat Yard, east side of the New Goods Shed. There they saw that the respondents/accused were about to board a tempo rickshaw No. MTT 5313 and go along with the railway iron properties. They caught the accused and made inquiry with them. The accused disclosed their names as Bhagwan Nagare and Kallu Ismail. The plastic gunny bags which were found with them were opened. The bags contained 95 screw-pipes weighing 50 kgs. one crossing gutka weighing 15 kgs. two crossing bearing plain plates 2′ in length 1′ in width having holes on all four sides′ weight 50 kgs. 3 small size plain bearing plates weighing 150 kgs. totally worth Rs.1600/-. ASI Pandey called two panchas and seized the said property under panchnama in the presence of the panchas. The accused could not give any satisfactory answers. They did not have any possession receipts as regards the seized property. In the inquiry the accused admitted their guilt and expressed their willingness to show the place from where they had brought the said property. The

staff and the panchas went to the said spot. The confessional statements of the accused were recorded in the presence of panchas. One screw-pipe and one slight chair were seized as samples. They were labelled. Signatures of the panchas were obtained on the said labels. Thereafter crime bearing No. 6 of 1991 was registered against the accused.

3. The investigating officer then called railway officer Shri R. D. Varma and showed him the said property. After verification Shri R. D. Varma opined that the said property belongs to railway department and was in working condition. He issued a certificate to that effect. Thereafter statements of witnesses were recorded. After the completion of the investigation, complaint was filed against the accused for the offence punishable under Section 3(a) of the said Act.

4. In support of its case, the prosecution examined PW 1 ASI Pandey, PW 2 Ramdin Umrai Varma, who has issued the certificates, PW 3 Hari Dhondiba Avtale and PW 4 Nathu Babu Kedare the panch witnesses, PW 5 Vachappa Laxmappa Lamani, ASI, PW 6 Dilip Ganpat Gajre and PW 7 Dashrath Vishnu Aher.

5. The accused pleaded not guilty to the charge and they claimed to be tried. After perusing the evidence on record the learned Magistrate came to the conclusion that the prosecution had not proved its case beyond reasonable doubt inasmuch as no independent witnesses were examined by it. In the circumstances, he acquitted the accused. The said judgment and order of acquittal is impugned in the present appeal.

6. I have heard Mrs. Deshmukh, learned APP in support of the appeal. She vehemently submitted that the impugned judgment and order is perverse and deserves to be set aside. She submitted that it is true that the panchas have turned hostile. However, the prosecution case is proved on the basis of the evidence of other witnesses namely PW 1 G.R. Pandey, PW 2 Ramdin Varma and PW 5 ASI Vachappa Lamani. The learned APP submitted that the confessional statements of the accused are on record. She submitted that confessional statements of the accused recorded under the said Act are admissible in evidence as the Railway Protection Officers are not police officers and, therefore, the learned Magistrate ought to have convicted the

accused on the basis of the said statements. The learned APP further contended that the prosecution has brought on record evidence to establish that the tempo in which the railway property was found belonged to accused 1. In the circumstances submitted the learned APP, this court should set aside the impugned judgment and order and convict the accused in accordance with law.

7. The respondents are served. One Murtaza Nazani has been appointed as amicus curiae for the accused. However, he is not present.

8. PW 1 G. R. Pandey has lodged the complaint which is at Exhibit 1. He has stated that upon receiving secret information he went to the railway yard with ASI and constable Shaikh Musa. He saw the tempo with railway material. He found that accused 1 was sitting at the driver’s seat and accused 2 was putting railway property in the tempo. Accused 1 was helping him. According to him he enquired with the accused and they admitted their guilt. He then attached the property in the presence of two panchas. He recorded the statements of the accused and he recorded the memorandum of panchnama.

9. PW 5 ASI Lamani has stated that on 25/2/91 ASI Pandey had called him. He along with one constable went to the new goods shed at Karjat. According to him he saw one outsider loading the railway material in the tempo. According to him they accosted the two persons who were loading the material. They disclosed their names. ASI Pandey called panchas and made further inquiry. Though this witness has stated that those two persons were present in the court, he has not disclosed their names.

10. PW 2 Ramdin Varma has stated that on 16/4/91 ASI Pandey had called him to his office at about 17.00 hrs. He asked him to examine some material. There were five gunny bags containing screw pipes. He found the said property to be railway property and accordingly he issued certificate Exh.-22. He has admitted that there was no railway marking on the said property. He has stated that the property received by the office is entered in the register but he had not verified his register about this. The prosecution has produced on record another certificate which is at Exh. 21 which also states that on 23/4/91 ASI Pandey had shown property to

Ramdin Varma and the said property was railway property. PW 2 Ramdin has identified his signature on this certificate. There is yet one more certificate. This certificate mentions subject as "shortage of material due to theft in Karjat yard". Certain property is said to be stolen from the Karjat yard. The prosecution has examined PW 6 Dilip Gajre and PW 7 Dashrat Aher, from whose evidence it is sought to be proved that the tempo in which railway property was kept belonged to accused 1.

11. I have perused the confessional statements of the accused in which the accused have admitted the guilt. In his supplementary statement accused 1 has admitted that the said tempo belongs to him. PW 3 Hari Avtale and PW 4Nathu Kedare who are the panch witnesses have, however, turned hostile.

12. Since the panch witnesses have turned hostile in this case, the prosecution solely depends on the evidence of the railway protection officers, the certificates issued by PW 2 Ramdin Varma and the confessional statements of the accused. It is true that confessional statements recorded by the inquiry officer under the said Act are not on par

with the statements recorded during the course of investigation by the police because the inquiry conducted by an officer of the railway protection force under section 8(1) of the said Act cannot be deemed to be an investigation for the purposes of Section 162 of the Code of Criminal Procedure. This position is made clear by the Supreme Court in **State of U.P. v. Durga Prasad, AIR 1974 SC 2136**.

13. It is equally well settled that the officer of railway police force could not be deemed to be a police officer within the meaning of Section 25 of the Evidence Act and, therefore, any confessional statement recorded by him in the course of an inquiry under Section 8(1) of the said Act cannot be excluded from evidence under the said section. This position is made clear by the Supreme Court in **Balkishan A. Devidayal v. State of Maharashtra, (1980) 4 S C C 600**. The question is whether in the present appeal against acquittal, the impugned judgment and order of acquittal should be set aside holding that the accused could be convicted solely on the basis of their confessional statements.

14. It is true that in the confessional statement the accused have admitted their guilt. PW 1 ASI

G.R. Pandey and PW 5 ASI Vachappa Lamani being railway protection officers are interested witnesses. One could have relied on evidence of PW 5 ASI Vachappa Lamani but Vachappa Lamani's evidence is not very clear. Though he has stated that the accused are present in the court he refused to state their names. I have already stated that the pancha witnesses have turned hostile. In such circumstances assuming that the tempo belonged to accused 1, in my opinion, it will not be safe to convict the accused on the evidence of PW 1, ASI Pandey.

15. It is pertinent to note that though certificates have been issued by PW 2 Ramdin Varma stating that the property which was seized is railway property, he has admitted that there are no marks on the said property indicating that it is railway property. Besides he has stated that he has not verified the entry made in the register. Register is not produced. I cannot lose sight of the fact that I am dealing with an appeal against the order of acquittal. In an appeal against acquittal, if the view taken by the trial court is a reasonably possible view then even if some other view is possible the court should not substitute that view in place of the view that has been taken

by the trial court while acquitting the accused. I am unable to characterise the impugned judgment and order as perverse.

16. In my opinion, in the facts and circumstances of the case, it would be unsafe to disturb the order of acquittal. The accused must be given benefit of doubt. Hence the appeal is dismissed.

(SMT. RANJANA DESAI,J.)